IN THE IOWA DISTRICT COURT FOR POLK COUNTY

URBANDALE COMMUNITY SCHOOL DISTRICT, Petitioner, vs. PUBLIC EMPLOYMENT RELATIONS BOARD, Respondent. UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, LOCAL 893 / IOWA UNITED PROFESSIONALS, Intervenor.	NO. AA 3012 RULING ON PETITION FOR JUDICIAL REVIEW

INTRODUCTION

On March 27, 1998, the Court heard arguments on Petitioner's Petition for Judicial Review. Petitioner, Urbandale Community School District ("District"), was represented by its attorney, Jeffrey A. Krausman. Respondent, the Public Employment Relations Board ("PERB"), was represented by its attorney, Jan Berry. The Intervenor, United Electrical, Radio & Machine Workers of America, Local 893 / Iowa United Professionals ("Union"), did not appear at oral argument but adopted the arguments of PERB. After reviewing the record and hearing the arguments of counsel, the Court enters the following ruling.

STATEMENT OF THE CASE

Petitioner appeals the May 9, 1997 decision of the Administrative Law Judge ("ALJ") fashioning a bargaining unit consisting of certain support staff employees. Petitioner alleges PERB erred in fashioning the scope of the bargaining unit, and in determining the high school head custodian was not a supervisory employee.

On March 20, 1997, the Union filed a Petition before PERB concerning the establishment of an appropriate collective bargaining unit. The Petition requested a unit composed of the District's full-time and regular part-time maintenance and trade workers, delivery driver, and custodians. (Vol. I, tab 1). It was amended at the hearing to also include the ground maintenance worker. (Vol. II, tab A at 54). The hearing was held on May 9, 1997 before Administrative Law Judge James A McClimon. At the hearing, the District advocated a "wall-to-wall" bargaining unit which included all of its bargaining-eligible classified employees. (Vol. II, tab A at 4-5). The District also argued the high school head custodian was a supervisory employee and thus excluded from any bargaining unit. (Vol. II, tab A at 46).

On June 16, 1997, the District filed its post-hearing brief. The Union filed its post-hearing brief on June 17, 1997. On September 15, 1997, the ALJ issued his Proposed Decision and Order, expanding the Union's proposed unit to include printers, cooks, and

servers. (Vol. I, tab 7 at 17). The ALJ also excluded the high school head custodian, finding the position supervisory. (Vol. I, tab 7 at 16-17).

The District filed a Notice of Appeal and Application for Stay on September 25, 1997. The Union acknowledged the appropriateness of the proposed unit but maintained the high school head custodian was not a true supervisor and should be included in the unit. (Vol. I, tab 11 at 2). PERB issued its final decision on October 15, 1997. In the decision, PERB adopted the ALJ's proposal concerning the appropriate bargaining unit, making an additional finding that the "extent of organization" factor under Iowa Code § 13.2 was a relevant consideration and an additional factor supporting the ALJ's conclusion. (Vol. I, tab 12 at 9). PERB also determined the high school head custodian was not a supervisory employee and thus should be included in the unit. (Vol. I, tab 12 at 12).

On November 10, 1997, the District filed this Petition for Judicial Review.

STATEMENT OF THE FACTS

The parties stipulated the District is a public employer and the Union is an employee organization as defined by the Public Employment Relations Act. (Vol. II, tab A at 3-4). The District consists of a high school, a middle school, and five elementary schools. The District's 222 teachers have a separate bargaining

unit. (Vol. II, tab A at 44). The District also employs approximately 152 classified personnel. (Vol. II, tab A at 53). Past "across-the-board" wage increases have been consistent with the percent wage increase negotiated by the teachers. (Vol. II, tab A at 41). The District annually prepares an employee handbook containing the classified personnel's wages, hours, conditions of employment, and benefits. In the past, some classified employees have met with District representatives for input into the handbook. (Vol. II, tab A at 41-43).

The length of the classified employee's contract, along with the number of hours worked, govern the classified employee's benefits. All 12-month classified employees receive the same life and long-term disability insurance, as well as, the same number of sick, bereavement, personal, and emergency leave days. Other employees working shorter schedules receive reduced benefits depending on the months and hours worked. Hourly rates of pay are contained in an eight pay grade classification system established by the District. (Vol. II, tab A at 56, 70-74).

The District's proposed bargaining unit includes approximately 130 positions, known as "classified personnel," that consist of maintenance workers, custodians, secretaries, educational associates, media techs, cooks, servers, and miscellaneous support personnel. Supervisors and confidential employees were excluded. (Vol. II, tab B1). The PERB bargaining unit includes approximately

53 positions, including full-time and regular part-time: (1) printers; (2) cooks; (3) food servers; (4) maintenance and trade workers; (5) custodians; (6)the delivery driver; and (7)the ground maintenance worker. (Vol. I, tab 12).

The Union currently represents custodians employed by the Storm Lake Community School District. (Vol. II, tab A at 90). The Union also represents all classified employees in the: (1) Adel-Desoto-Minburn; (2)Boone; (3) Perry; and (4) Western Dubuque Community School Districts. (Vol. II, tab A at 90). Ryan Downing, the union organizer, testified the Union stipulated to a wall-to-wall bargaining unit in at least one of these cases because the employees in those districts wanted to organize and bargain as large units. (Vol. II, tab A at 82). He testified that in Urbandale not all classified employees wanted to organize and bargain collectively. (Vol. II, tab A at 83).

The high school head custodian, Kurt Nelson, reports to Mark Moore and the high school principal. (Vol. II, tab A at 109). He is paid $2.00 more per hour than starting custodians. (Vol. II, tab A at 35). Nelson's daily duties consist of: (1) inspecting the high school building and campus; (2) addressing custodial or routine maintenance problems raised by teachers or staff; and (3) performing the same tasks as other custodians. He assigns custodians to some daily tasks, as well as to scheduled before or after school activities. (Vol. II, tab A at 103-105.

As high school head custodian, Nelson attended a seminar with Mark Moore and the high school principal. (Vol. II, tab A at 136-137). After this seminar, Nelson developed a "team cleaning procedure" which was modified by others. The principal approved the modified procedure. (Vol. II, tab A at 137). Nelson also participated in team interviews of candidates for employment but: (1) has never interviewed a candidate alone; (2) some custodians have been hired without his input; and (3) does not make any final hiring decisions. (Vol. II, tab A at 129-131, 140). Nelson has also participated in team evaluations of custodians. The high school principal signs the custodians' written evaluations. (Vol. II, tab A at 110-111). Nelson also issued three verbal reprimands to other employees, but consulted first with his direct supervisor. (Vol. II, tab A at 110). His supervisor overruled one recommendation to reprimand an employee. (Vol. II, tab A at 144). Nelson does not issue written reprimands. Mark More issues written reprimands. (Vol. II, tab A at 157-160).

STANDARD OF REVIEW

Judicial review of an administrative agency action is governed by the standards of Iowa Code § 17A.19(8) (1997). The court acts in an appellate capacity by reviewing the agency's decision to correct any errors of law. Gaffney v. Department of Employment Serv., 540 N.W.2d 430, 433 (Iowa 1995). The court has no original authority to declare the rights of the parties. Office of Consumer

Advocate v. Iowa State Commerce Comm'n., 432 N.W.2d 148, 156 (Iowa 1988). Nearly all disputes within the scope of administrative law are won or lost at the agency level. Sellers v. Employment Appeal Bd., 531 N.W.2d 645, 646 (Iowa Ct. App. 1995).

The court may reverse an agency action that is in excess of the statutory authority of the agency. Iowa Code § 17A.19(b) (1997). An administrative agency has no inherent power and has only such jurisdiction and authority as expressly conferred by statute or necessarily inferred from the power expressly granted. Iowa Power and Light Co. v. Iowa State Commerce Comm'n., 410 N.W.2d 236, 240 (Iowa 1987). An agency action beyond the statutory authority of the agency is an error of law which should be corrected by the court on judicial review. Northwestern Bell Tel. Co. v. Iowa Utilities Bd., 477 N.W.2d 678, 682 (Iowa 1991).

An agency action that is affected by an error of law or violative of constitutional or statutory provisions is subject to reversal under Iowa Code § 17A.19(8)(a)and (e). Northwestern Bell Tel. Co., 477 N.W.2d at 682. In deciding whether an agency made an error of law, the court gives some weight to the agency's construction of a statute, but is not bound by it. Super Valu Stores v. Iowa Dep't. of Revenue, 479 N.W.2d 255, 258 (Iowa 1991), cert. denied, 112 S. Ct. 3014.

Violation of an agency rule is reversible error. Iowa Code § 17A.19(8)(c) (1997). The court gives an administrative agency a

reasonable range of informed discretion in the interpretation and application of its own administrative rules. Meads v. Iowa Dep't. of Social Services, 366 N.W.2d 555, 558 (Iowa 1985). However, the court is not bound by the agency's determinations concerning administrative rules. Cosper v. Iowa Dep't. of Job Service, 321 N.W.2d 6, 10 (Iowa 1982). The court will not defer to an agency interpretation that is plainly inconsistent with its rule or plainly erroneous. Sommers v. Iowa Civil Rights Comm'n., 337 N.W.2d 470, 475 (Iowa 1993).

Iowa Code § 17A.19(8)(g) provides the court may reverse an agency action that is unreasonable, arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Unreasonableness is an action in the face of evidence such that there is no room for difference of opinion among reasonable minds, or an action not based upon substantial evidence. Northwestern Bell Tel. Co., 477 N.W.2d at 682. The agency is free to exercise its expertise within a reasonable range of informed discretion. Id. Discretion is abused when it is exercised on clearly untenable grounds or to a clearly unreasonable extent. Ashmead v. Harris, 336 N.W.2d 197, 199 (Iowa 1983). Arbitrary and capricious are practically synonymous. Both refer to agency action taken without regard to law or the facts of the case. Office of Consumer Advocate v. Iowa State Commerce Comm'n., 419 N.W.2d 373, 374 (Iowa 1988).

Judicial review of an agency decision is at law. The agency's findings will be reversed only if, after reviewing the record as a whole, substantial evidence does not support them. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 271 (Iowa 1995). Evidence is substantial if reasonable minds would find it adequate to reach the conclusion at issue. Id. The mere fact that inconsistent conclusions could be drawn from the same evidence does not mean substantial evidence does not support the Commissioner's determinations. The question is not whether the evidence supports a different finding, but whether it supports the findings the Commissioner actually made. Id. A reviewing court may interfere with the agency's findings only if the evidence is uncontradicted and reasonable minds could not draw different inferences. Riley v. Oscar Mayer Foods Corp., 532 N.W.2d 489, 491 (Iowa Ct. App. 1995).

ANALYSIS

I. Appropriate Bargaining Unit

The District argues the bargaining unit approved by PERB is not an appropriate unit and the District's proposal more closely meets the requirements of Iowa Code § 20.13. At oral argument, the District asserted PERB ignored or misinterpreted the factors supporting the District's position.

Iowa Code § 20.13 provides that in defining a bargaining unit PERB shall consider, along with other relevant factors: (1) the principles of efficient administration of government; (2) the

existence of a community of interest among public employees; (3) the history and extent of public employee organization; (4) geographical location; and (5) the recommendations of the parties involved. Iowa Code § 20.13 (1997). Bargaining unit determinations call for a case-by-case analysis which requires consistency in reasoning and weighing factors leading to a decision tailored to fit the particular facts of each case. Anthon-Oto Community Sch. Dist. v. Public Employment Relations Bd., 404 N.W.2d 140, 144 (Iowa 1987). The agency gives appropriate weight to those factors deemed most relevant under the circumstances. Dubuque Community Sch. Dist. v. Public Employment Relations Bd., 424 N.W.2d 427 (Iowa 1988).

Viewing the record as a whole, PERB's decision was not erroneous, unsupported, unreasonable, arbitrary, capricious, or an abuse of discretion. PERB did not ignore or misinterpret the § 20.13 factors, but rather gave the appropriate weight to each.

Under the "efficient administration of government" test, the ALJ concluded it was reasonable that a single District-wide classified bargaining unit would be more cost-efficient for the District. The PERB final decision adopted the ALJ's conclusions of law. This factor was decided in the District's favor.

Under the "community of interests" test, PERB agreed with the District that a single large unit might constitute an appropriate bargaining unit in the District. However, PERB determined the

smaller unit shared a greater community of interest with one another than with those not included. In measuring the "community of interest" PERB looks at the: (1) duties; (2) skills; (3) qualifications; (4) methods of compensation; (5) benefits; (6) hours of work; (7) common supervision; (8) employee contact with other employees; (9) integration of work functions; (10) time spent away from the work site; (11) similarity of working conditions; and (12) promotional ladders used by employees. Dubuque Community Sch. Dist., 424 N.W.2d at 431. The duties, skills, qualifications, contact with other employees, integration of work functions, and similarity of working conditions all establish a clear distinction between the employees included in the bargaining unit and those excluded. The ALJ and PERB placed great weight on these distinctions. This is an appropriate exercise of the agency's discretion. The fact that the Union has organized "wall-to-wall" bargaining units in other school districts is not significant since nothing in the record suggests the job duties and responsibilities of the classified employees in those districts are the same as required in this district.

The lack of historical affiliation with another bargaining unit renders that factor insignificant. See Anthon-Oto, 404 N.W.2d at 143. The fact that certain classified employees have had limited input into conditions of employment does not support a conclusion that classified employees as a unit have a history of

effectively altering their conditions of employment. PERB did determine the "extent of public employee organization" was a relevant factor that supported the ALJ's conclusion. This factor considers the groups of employees on which the Union focused its organizing efforts. The Union organizer testified the meetings held in the district focused on custodians and trade workers wanting to organize. (Vol. II, tab A at 91). Thus, the record supports this determination. As PERB noted, the District's proposed unit ignores this factor.

The District argues the "geographical location" factor supports their proposed bargaining unit. PERB found this factor irrelevant. The record establishes both the employees included by PERB in the bargaining unit and the employees included in the District's proposed unit work at the different school buildings throughout the district. Thus, this factor is not a controlling consideration.

Finally, the "recommendations of the parties" is also not a controlling factor because the District and the Union do not agree on an appropriate bargaining unit.

PERB considered each of the factors listed in Iowa Code § 20.13. It is possible a different conclusion could have been drawn from the evidence, but the test is not whether the evidence supports a different conclusion, but whether it supports the findings actually made. As stated above, substantial evidence

supports PERB's determinations. Furthermore, PERB determines the appropriate weight to be given to the § 20.13 factors. PERB exercised a reasonable range of informed discretion in giving the "community of interest" and "extent of organization" factors more weight than the "efficient administration of government" factor. PERB's decision is supported by substantial evidence and is not unreasonable, arbitrary, capricious, or an abuse of discretion. Thus, PERB's decision determining the appropriate bargaining unit should be affirmed.

II. Supervisory Employee

The District argues PERB erred in deciding the high school head custodian was not a supervisor. The District contends the duties exercised by this position are not so routine as to render the high school head custodian a mere lead worker. The District points to the head custodian's role in directing the work of others, his participation in the hiring process, and his ability to discipline other employees. On the other hand, PERB asserts the position possesses no real supervisory authority.

The determination of who are supervisors is ordinarily a fact question and PERB's exercise of discretion will be accepted by reviewing courts if it has a reasonable basis in law and is supported by the record. State v. Public Employment Relations Bd., 560 N.W.2d 560, 562 (Iowa 1997). The Public Employment Relations Act is written in broad language so as to allow a large number of

public employees to be eligible for coverage, and the exclusions under Iowa Code § 20.4 must be interpreted with that goal in mind. Id. (citations omitted). Under Iowa Code § 20.4(2) a supervisor includes any employee with the authority to: (1) hire; (2) transfer; (3) suspend; (4) layoff; (5) recall; (6) promote; (7) discharge; (8) assign; (9) reward or discipline other public employees; (10) direct other public employees; (11) adjust grievances; or (12) effectively to recommend such action. Iowa Code § 20.4(2)(1997). However, the exercise of this authority must be more than merely routine and requires the use of independent judgment. Iowa Code § 20.4.

Applying the facts presented in the record to this case, the head custodian does not use independent judgment in hiring, directing, or disciplining other custodians. Nelson testified he participated in the hiring process by sitting on interview panels. He did not make independent judgments concerning the hiring of the new employees but rather merely participated as one person among several on the interview panel and the panels then made a recommendation to higher-ups. (Vol. II, tab A at 129-131, 140). Thus, the record supports PERB's determination that the head custodian did not exercise independent judgment in the hiring process so as to make him a supervisor.

As for the authority to direct the other custodians, Nelson testified other than delegating tasks or shifting work in

accordance with evening programming; he does not have any supervisory authority independent of Mark Moore. (Vol. II, tab A at 133). Repetitive or rote tasks are not considered supervisory, nor are functions requiring little more than the use of common sense. City of Davenport v. Public Employment Relations Bd., 264 N.W.2d 307, 314 (Iowa 1978). An individual who merely serves as a conduit for orders emanating from superiors acts routinely. Id. The jobs in the building are already set except for the ones depending on special programs. The custodians rotate jobs every two weeks and Nelson informs the custodians as to what their responsibilities are. (Vol. II, tab A at 104). As an example, the principal decided the grounds should be policed so it became part of the day custodian's duties. (Vol. II, tab A at 150). Nelson acts as a conduit for orders emanating from his superiors. His role in directing and assigning other custodians is routine and does not require the use of independent judgment.

Furthermore, the head custodian does not use independent judgment in disciplining the other custodians. Nelson testified he issued verbal reprimands but only after consulting with his supervisor. His supervisor had in the past overruled his wish to verbally reprimand an employee. (Vol. II, tab A at 144). This is not indicative of the exercise of independent judgment. Even if this was not the case, "[f]or an employee to be a supervisor based on authority to discipline, he must have more than the power to

issue verbal reprimands." City of Davenport, 264 N.W.2d at 321. Nelson testified he has never issued a written reprimand. (Vol. II, tab A at 157-160). The record is devoid of any evidence the head custodian had the power to impose a discipline more severe than a verbal reprimand. Thus, substantial evidence in the record exists to support PERB's conclusion that the head custodian is not a supervisor based on his ability to discipline others.

For these reasons, PERB's decision that the high school head custodian was not a supervisor is supported by substantial evidence, not violative of a statute or rule, and not unreasonable, arbitrary, capricious, or an abuse of discretion. Thus, PERB's decision should be affirmed.

RULING

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT the October 15, 1997 decision of the Public Employment Relations Board be AFFIRMED. The costs of this action are assessed against the Petitioner.

DONE AND ORDERED THIS 7th DAY OF April, 1998.

William Joy

WILLIAM H. JOY, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA